



repeatedly telling the U.S. Trademark Office – falsely – that its use of the mark was “continuous” and “ongoing,” its trademark registration should be cancelled.

## **II. The Uncontested Facts.**

### **A. The Defendant Garrison Brothers Distillery.**

Defendant Lone Star Distillery, LLC, d/b/a Garrison Brothers Distillery, is Texas’ first and oldest whiskey distillery. Dan Garrison, its founder, first dreamed of making straight bourbon whiskey in Texas some fifteen years ago. He bought a working Hill Country ranch in 2004, formed an LLC in 2006, and began acquiring the necessary silos, cisterns, fermenting tanks, stills, barrel storage facilities and bottling equipment. He was distilling bourbon by January 2008, using only local water and Texas-grown corn, wheat and barley. Garrison is currently the Vice President of the American Craft Spirits Association, which has some 250 member distilleries. Ex. 1 ¶¶ 1-2.

Garrison Brothers’ first product, an early release called “The Young Gun,” was first sold on March 2, 2010, Texas Independence Day. In 2011, Garrison Brothers made its first release of its flagship product, “Garrison Brothers Texas Straight Bourbon Whiskey.” The distillery sells a new release every year. From 2010 to 2016, Garrison Brothers’ production of bourbon increased ten-fold. The distillery has received high accolades and won many awards. It is recognized as one of the finest craft distilleries in the country. Ex. 1 ¶ 3.

Beginning in 2008, Garrison Brothers began setting aside particularly choice barrels of its flagship bourbon for special releases. In April 2013, the distillery released an uncut and unfiltered version of its bourbon called “Garrison Brothers Cowboy Bourbon.” This was a limited release and is considered the distillery’s finest product, selling for \$119 and up per 375 ml bottle. It quickly sold out. The name “Cowboy Bourbon” continued the theme started

with the “Young Gun” release, evoking both the distillery’s roots in Texas and the special release’s barrel-proof strength – the way whiskey was served in Old West saloons. In 2014, Jim Murray’s *Whisky Bible* named Garrison Brothers Cowboy Bourbon the “American Micro Whiskey of the Year.” A second release came out in 2015, and likewise quickly sold out. Garrison Brothers plans continued limited releases of Garrison Brothers Cowboy Bourbon every two years. Ex. 1 ¶ 4.

After the 2013 release of Garrison Brothers Cowboy Bourbon sold out, and after it was named Micro Whiskey of the Year by the *Whisky Bible*, Dan Garrison received a cease-and-desist letter from the Plaintiff’s counsel accompanied by the Complaint in this lawsuit, alleging that Garrison Brothers was infringing the Plaintiff’s trademark in “Cowboy Little Barrel.” Despite years in the business, Garrison had never heard of a bourbon called “Cowboy Little Barrel.” His search of the Internet for any product sold under that name turned up nothing. Ex. 1 ¶ 5. For good reason: the Plaintiff had never sold “Cowboy Little Barrel” bourbon in the United States and had not sold any product under that name anywhere since at least 2005.

#### **B. The Plaintiff Allied Lomar, Inc.**

Unlike Garrison Brothers, the Plaintiff is not a distillery. Although the Plaintiff alleges that it is “in the business of selling, marketing and distributing” distilled spirits, FAC ¶ 2, it does not manufacture any alcohol. Instead, it purchases alcohol distilled by others, bottles it and adds its own label. Ex. 2 at 24:11-17 (Palatella Depo.). In some instances, it may blend different alcohol products together with coloring, flavorings or blending materials. *See* 25 C.F.R. § 5.22(b)(4).

The Plaintiff claims that, prior to 2005, it purchased raw bourbon, called “juice,” from Kentucky distillers, and then bottled and sold that bourbon under the name “Cowboy Little

Barrel.” Ex. 2 at 23:15-18. The Plaintiff’s president, Marci Palatella, claims it sold “Cowboy Little Barrel”-branded bourbon in a variety of bottles and with a variety of labels in Japan and other countries in the early 2000s. Despite repeated requests in discovery, the Plaintiff has not produced any business records documenting the amount or extent of these alleged non-U.S. sales. *Id.* at 20:16-21:3.

During discovery, however, the Plaintiff did admit two dispositive facts: (1) it had never sold a single bottle of “Cowboy Little Barrel” in the United States; and (2) it had not bottled, labeled or sold a single bottle of “Cowboy Little Barrel” anywhere for over ten years. *Id.* at 28:1-13. All the Plaintiff has is a federal trademark registration, on which it asks this Court to enjoin the sale of an *actual* product made and sold in the United States. But like its long-absent “Cowboy Little Barrel” bourbon, the Plaintiff’s trademark registration is an illusion. The Plaintiff’s registration would have been automatically cancelled years ago, except the Plaintiff twice told the Trademark Office – falsely – that its use of the trademark was “continuous” and “ongoing” and twice filed outdated specimens purportedly showing current use, even though sales of “Cowboy Little Barrel” had ceased years before. *See* Ex. 5 & 6.

**B. Plaintiff’s false statements to the Trademark Office.**

On February 8, 2001, the Plaintiff filed a Section 1(a) application with the Trademark Office to register a trademark for “Cowboy Little Barrel” under International Class 33 (alcoholic beverages) for bourbon whiskey. Ex. 3. The Plaintiff claimed a first use in commerce date of August 31, 1995. Because the Plaintiff sought a U.S. registration, it was asserting that the use was in commerce *in* the United States. *See* 15 U.S.C. § 1127 (defining “commerce” as “all commerce which may be lawfully regulated by Congress”). Based on that assertion, the Trademark Office registered the mark on October 28, 2003.

### 1. The False Section 8 Declaration.

Federal law requires the holder of a new trademark registration to file, before the end of the 6-year period after the registration date, a sworn Declaration of Use or Excusable Nonuse. 15 U.S.C. § 1058(a)(1). That affidavit, commonly called a Section 8 declaration, must either (1) state that the mark is in use in commerce, identify the goods on which the mark is in use, and provide a specimen showing current use in commerce, or (2) state that the mark is not in use and “include a showing that any nonuse is due to special circumstances which excuse such nonuse and is not due to any intention to abandon the mark.” 15 U.S.C. § 1058(b). Failure to timely file a Section 8 declaration results in cancellation of the registration. 15 U.S.C. § 1058(a).

In discovery, the Plaintiff admitted that any foreign sales of “Cowboy Little Barrel” ended by 2005 at the latest and it had no United States sales at all. Ex. 2 at 19:18-25, 27:21-25, 28:9-13, 100-01. In fact, the Plaintiff admitted because “there hasn’t been supply since we’ve had the trademark, we haven’t been selling.” *Id.* 60:7-10. I

Nonetheless, on October 26, 2008, three years after the last bottle of “Cowboy Little Barrel” was sold, the Plaintiff filed a sworn declaration with the Trademark Office stating that:

*[t]he mark is in use in commerce on or in connection with the goods and/or services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce. The mark has been in continuous use in commerce for five (5) consecutive years after the date of registration, or the date of publication under Section 12(c),<sup>1</sup> and is still in use in commerce.*

Ex. 4 (emphasis added). The Plaintiff submitted an undated photograph of a bottle of “Cowboy Little Barrel.” This statement was materially false in at least three ways:

- “Cowboy Little Barrel” had *not* been “in continuous use in commerce” for five consecutive years since registration of the mark on October 28, 2003.
- “Cowboy Little Barrel” was *not* “still in use in commerce.”

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<sup>1</sup> Section 12(c) governs intent-to-use trademark registrations, not at issue here.

- The specimen photo did *not* show the mark as currently “in use in commerce.”

## **2. The False 10-Year Renewal Declaration.**

Federal law also requires a trademark owner to renew a registration during the year prior to the tenth anniversary of its registration date. 15 U.S.C. § 1059(a). Renewal requires filing a sworn Section 8 declaration attesting to continued use of the trademark in commerce or special circumstances that excuse nonuse of the trademark. 15 U.S.C. § 1059(a); § 1058(b). Trademark registrations expire after ten years if not properly renewed. 15 U.S.C. § 1058(a); § 1059(a).

When the ten-year anniversary of the Plaintiff’s trademark registration approached in October 2013, the Plaintiff still had not sold a single bottle of “Cowboy Little Barrel” in the United States. Ex. 2 at 76:6-13. It had not sold a bottle anywhere for eight years. Nonetheless, the Plaintiff again told the Trademark Office on October 1, 2013, that the “Cowboy Little Barrel” trademark was “in use in commerce.” Ex. 4. As “proof” of its continued use in commerce of the trademark, the Plaintiff filed the same photograph of a single bottle it had filed in 2008. *Id.*

## **III. Grounds for Summary Judgment.**

The Plaintiff asserts two causes of action – Trademark Infringement (15 U.S.C. § 1114) and Unfair Competition (15 U.S.C. § 1125(1)(A)) – plus two counts seeking relief under 15 U.S.C. § 1125(a). Both causes of action are based on the allegation that the Garrison Brothers Cowboy Bourbon name infringes the Plaintiff’s alleged trademark rights in “Cowboy Little Barrel.”

To prove Trademark Infringement, the Plaintiff must show the Defendant (1) without the Plaintiff’s consent (1) used in commerce (2) a reproduction, counterfeit, copy or colorable imitation of (3) the Plaintiff’s registered trademark; (4) in connection with the sale, offering for

sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion or mistake, or to deceive. 15 U.S.C. § 1114(1).

To prove Unfair Competition, the Plaintiff must prove the Defendant (1) in connection with any goods or services (2) used in commerce (3) a word, term, name, symbol, or device, false designation of origin or other false or misleading statement of fact that (4) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association with the Plaintiff as to the origin, sponsorship or approval of the Defendant's goods. 15 U.S.C. § 1125(a)(1)(A). Because the Plaintiff's unfair competition claim is based on its alleged trademark rights in "Cowboy Little Barrel," it must establish (1) a protectable trademark and (2) a likelihood of consumer confusion between the parties' products. *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 767 n.4 (1992).

The Defendant moves for summary judgment on both claims and the related counts for relief because the Plaintiff cannot prove two essential elements of its claims: (1) protectable trademark rights and (2) likelihood of confusion.

**A. The Plaintiff never sold or obtained the right to sell "Cowboy Little Barrel" bourbon in the United States. Thus, it has no domestic trademark rights and cannot show a likelihood of confusion as to the Defendant's product.**

This case is unique – and uniquely situated for summary judgment – because it is undisputed the Plaintiff never sold or obtained the right to sell any "Cowboy Little Barrel" bourbon in the United States and ended any sales no later than 2005.

A legal prerequisite to bottling or removing liquor from a distillery is obtaining a Certificate of Label Approval ("COLA") from the United States Treasury's Alcohol and Tobacco Tax Bureau. 27 C.F.R. § 5.5(a). While the Plaintiff claims it had the legal right, without a COLA, to have its product bottled and labeled in Kentucky, transported to California,

and marketed from California to foreign customers, it does not claim that a single bottle of “Cowboy Little Barrel” was ever legally sold to a United States consumer. The only alleged sales – which the Plaintiff admits had ceased by 2005 – were to distributors for sale overseas. The Plaintiff did not even apply for a COLA until 2015, *after* it learned about Garrison Brothers Cowboy Bourbon, *after* it filed this lawsuit, and *after* the Defendant moved to dismiss the Plaintiff’s claims on that basis.<sup>2</sup>

Trademark law is territorial; that is, trademark rights are developed by using the trademark in commerce in a given territory. *Ingenohl v. Walter E. Olsen & Co.*, 273 U.S. 541, 544 (1927); *Fuji Photo Film Co. v. Shinohara*, 754 F.2d 591, 599 (5<sup>th</sup> Cir. 1985). Unlike patent registration, trademark registration does not create trademark rights; such rights must exist independent of the application and are created through *actual use* of the mark in commerce.

The owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. ... . [A] trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one’s good-will in trade by placing a distinguishing mark or symbol – a commercial signature – upon the merchandise or the package in which it is sold. It results that the adoption of a trade-mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade.

*United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 98 (1918) (citations omitted). That is, trademark rights extend only “wherever the trade goes, attended by the use of the mark.” *Id.*

If the Plaintiff, in fact, sold “Cowboy Little Barrel” bourbon to consumers in Japan, it may have developed enforceable trademark rights in Japan, where Garrison Brothers Cowboy Bourbon is not sold. However, having admitted no sales to consumers in the United States, it is doubtful the Plaintiff created any enforceable trademark rights in the United States.

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<sup>2</sup> The Plaintiff’s claim that its use in commerce was continuing and ongoing because it was doing some level of marketing or advertising that was viewable by domestic customers, *see* Ex. 2 at 128, is belied by the fact that it was legally prohibited from selling to U.S. customers.



[A] prior use of a trade-mark in a foreign country [does] not entitle its owner to claim exclusive trade-mark rights in the United States as against one who in good faith had adopted a like trade-mark here prior to the entry of the foreigner into this market.

*United Drug Co.*, 248 U.S. at 100-01; *Fuji Photo Film Co.*, 754 F.2d at 546 (“It is well settled that foreign use is ineffectual to create trademark rights in the United States.”). The Plaintiff does not, and cannot, claim that “Cowboy Little Barrel” brand was so famous overseas that it developed good will with United States customers. *See Grupo Gigante S.A. de C.V. v. Dallo & Co.*, 391 F.3d 1088 (9<sup>th</sup> Cir. 2002) (famous Mexican grocery store chain established trademark rights enforceable in San Diego where it had thousands of U.S. customers who shopped at its store in Tijuana).

And even if its alleged sales to foreign distributors for sales to overseas customers created some thin trademark protection in the United States, the Plaintiff cannot – as a matter of law – establish any likelihood of confusion among United States consumers, an essential element of its claims. 15 U.S.C. § 1114(1); § 1125(a)(1)(A). Because “Cowboy Little Barrel” was not (and could not be) sold in the United States prior to the release Garrison Brothers Cowboy Bourbon (or since), the Plaintiff cannot prove likelihood of confusion with Garrison Brothers Cowboy Bourbon. Given the complete absence of U.S. sales, it is simply not possible that domestic consumers would associate “Cowboy Little Barrel” with the Plaintiff; the Plaintiff has no good will associated with that brand in the United States. It therefore cannot prove that a consumer would be likely to confuse Garrison Brothers Cowboy Bourbon, a bourbon sold exclusively within the United States, with a product that has never been sold domestically. *Filipino Yellow Pages, Inc. v. Asian Journal Pubs., Inc.*, 198 F.3d 1143, 1151 (9<sup>th</sup> Cir. 1999).<sup>3</sup>

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<sup>3</sup> To the extent the Plaintiff falls back on its sales to distributors as the basis for establishing U.S. trademark rights and good will, the Plaintiff does not, and cannot, allege that distributors would be likely to be confused that the source of Garrison Brothers Cowboy Bourbon is the Plaintiff. The Plaintiffs’ unproven assertion that distributors believe consumers *would be* confused if “Cowboy Little Barrel” were

**B. Any trademark rights the Plaintiff might have gained by shipping “Cowboy Little Barrel” overseas have been abandoned.**

While it is doubtful the Plaintiff ever obtained any domestic trademark rights, whatever thin rights it may have gained by shipping bottles overseas were abandoned long before Garrison Brothers Cowboy Bourbon was released in 2013 – thereby defeating any claim of infringement as a matter of law.

**1. The Plaintiff’s mark is legally presumed abandoned as of 2008.**

The basic rule of trademark law is “Use it or lose it.” *See* McCarthy on Trademarks § 17:9 at 17-12. “It is the actual use of a symbol as a ‘trademark’ in the sale of goods which creates and builds up rights in a mark.” *Id.* Therefore, “lack of actual use of a symbol as a ‘trademark’ can result in a loss of legal rights,” known as abandonment. *Id.*

***If No Trade, Then No Trademark.*** When a business or product symbolized by a mark ceases its activities or sales, the good will of that mark immediately begins to fade. If sales cease long enough, there may be no good will left which a mark would symbolize. ... Thus, if for any reason, the good will of a business or product comes to end, there is nothing left for a mark to symbolize. Such a mark should be officially declared ‘abandoned.’

McCarthy on Trademarks § 17:14 at 17-27.

This rule is so strong that the law presumes abandonment after three years of nonuse in commerce. 15 U.S.C. § 1127 (“Nonuse for 3 consecutive years shall be prima facie evidence of abandonment.”). “Use in commerce” means “the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” 15 U.S.C. § 1127. To overcome a presumption of abandonment, the claimant must demonstrate a bona fide intent to resume use in each successive three-year period of nonuse, of which there were at least three in this case. *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 149 n.9 (2<sup>nd</sup> Cir. 2007). Once prima facie abandonment is

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sold in the United States is both hearsay and speculative, given the absence of any prior sales, consumer surveys or other evidence showing a likelihood of consumer confusion.

shown, a claimant's original intent to abandon is irrelevant; it must then prove an intent *to resume use* to preserve its rights. *Exxon Corp. v. Humble Exploration Co.*, 695 F.2d 96, 102 (5<sup>th</sup> Cir. 1983)

The Plaintiff admitted in discovery it has not filled, labeled or shipped a single bottle of "Cowboy Little Barrel" since 2004 – eleven years before it brought this lawsuit and nine years before the first release of Garrison Brothers Cowboy Bourbon. Its trademark is therefore presumed abandoned, shifting the burden to the Plaintiff to prove that eleven continuous years of nonuse did not constitute abandonment. 15 U.S.C. § 1127. To do so, the Plaintiff must prove both a valid reason for nonuse and an intent to resume use. *E. Remy Martin & Co v. Shaw Ross Intern. Imports, Inc.*, 756 F.2d 1525, 1532 (11<sup>th</sup> Cir. 1985); *Empressa Cubana del Tabaco v. Culbro Corp.*, 213 F. Supp.2d 247, 271 (S.D.N.Y. 2002). Use of a mark in a foreign country is no evidence of an intent to use that mark in the United States. *Boulle, Ltd. v. De Boulle Diamond & Jewelry, Inc.*, No. 3:12-CV-1462-L(BF), 2014 WL 4413601, \*11 (N.D. Tex. July 31, 2014); McCarthy on Trademarks § 17:3 at 17-4.

An intent to resume use requires objective evidence of "concrete plans ... to resume use" in the "reasonably foreseeable future when the conditions requiring suspension abate." *Rivard v. Linville*, 133 F.3d 1446, 1449 (Fed. Cir. 1998). *See also Buck v. Palmer*, No. A-08-CA-572-SS, 2013 WL 11323280, at \*4 (W.D. Tex. July 10, 2013) (Vague statement of intent to resume use "does not rise to the level of objective hard evidence of actual concrete plans to resume use."). The "hard evidence" must show an intent to resume use during the initial three-year period of nonuse; later efforts to dust off and use a dormant mark will not avoid abandonment. *Buck*, 2013 WL 11323280 at \*3 (quoting *ITC Ltd.*, 482 F.3d at 149 n.9).

Simply *asserting* an intent to resume use carries little or no weight and will not prevent abandonment. *Exxon Corp. v. Humble Exploration Co.*, 695 F.2d 96, 99 (5<sup>th</sup> Cir. 1983). Rather, the parting asserting trademark ownership must prove activities “a reasonable businessman, who had a bona fide intent to use the mark in United States commerce, would have taken.” *Silverman v. CBS, Inc.*, 870 F.2d 40, 47 (2<sup>nd</sup> Cir. 1989). The law does not permit “warehousing” unused trademarks. *Exxon Corp.*, 695 F.2d at 100-01. *See also AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, (11<sup>th</sup> Cir. 1986) (“Trademark rights flow from use, not from intent to protect rights. ... The Lanham Act does not permit such warehousing of trademarks.”).<sup>4</sup> Once trademark rights are lost due to a three-year period of abandonment, they cannot be regained by subsequent use. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1550 (11<sup>th</sup> Cir. 1986).

## **2. The Plaintiff has no excuse for eleven years of nonuse.**

During eleven years of nonuse, the Plaintiff conducted, at most, a trademark maintenance program, not bona fide use in commerce. While it filed (false) declarations of use to prevent its registration from being cancelled, it had no marketing plan, did little or no advertising, produced no product and made no sales. Ex. 2 at 43:4-20. This is insufficient to avoid abandonment or show intent to resume use. *See La Societe Anonyme des Parfumes LeGalion v. Jean Patou, Inc.*, 495 1265, 1273 (2<sup>nd</sup> Cir. 1974).

In an effort to overcome the legal presumption of abandonment, the Plaintiff claims it could not produce any “Cowboy Little Barrel” because there was no wholesale bourbon for purchase anywhere between 2005 and 2015. This is not true; suppliers offered to sell Dan Garrison wholesale bourbon when he was launching his distillery. Ex. 1 ¶ 6. Even if such a shortage had occurred, it would not save the Plaintiff’s registration from abandonment.

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<sup>4</sup> The Plaintiff holds at least 25 trademark registrations, many of which are currently unused. Ex. 2 at 14:6-16:16, 18:10-19:5.

First, in 2008 and 2013 – during the alleged bourbon shortage – the Plaintiff told the Trademark Office it was, and had been, continuously using “Cowboy Little Barrel” on bourbon bottles in commerce. Twice, it submitted a picture of a bourbon bottle as evidence of its continued use in commerce. If the Plaintiff had not made these statements, its trademark registration would have been cancelled. 15 U.S.C. § 1058(a); § 1059(a).

The Plaintiff could have told the Trademark Office the truth and still retained its trademark, if it could establish a valid reason for its extended years of nonuse:

If the registered mark is not in use in commerce on or in connection with all the goods, services, or classes specified in the registration, [the registrant must] *set forth the date when such use of the mark in commerce stopped and the approximate date when such use is expected to resume; and recite facts to show that nonuse as to those goods, service, or classes is due to special circumstances that excuse the nonuse* and is not due to an intention to abandon the mark . . . .

37 C.F.R. § 2.161(f)(2) (emphasis added). *See also* Trademark Manual of Examining Procedure § 1604.1 (“The affidavit or declaration must state when use in commerce stopped [and] should also specify the reason for nonuse, the specific steps being taken to put the mark back in use, and any other relevant facts to support a finding of excusable nonuse.”).

The Plaintiff had two opportunities to tell the Trademark Office the truth – that it had not used the “Cowboy Little Barrel” mark since 2005 – and to offer up an excuse for its nonuse. It did not. Instead, it falsely claimed continuous and ongoing use. Now, with its nonuse exposed and its registration challenged, the Plaintiff invents a ten-year bourbon drought. However, it maintained its registration only by repeatedly filing in the Trademark Office a picture of a full bottled of bourbon as evidence of ongoing use in commerce. It cannot now defeat abandonment and seek remedies against the Defendant by telling this Court the exact opposite. *Smith International, Inc. v. Olin Corp.*, 209 U.S.P.Q. 1033, 1981 WL 48127, \*7 (T.T.A.B. 1981) (“[W]illful withholding from the Patent and Trademark Office by an applicant or registrant of

material information or facts which, if disclosed to the Office, would have resulted in the disallowance of the registration sought or to be maintained.”).

Moreover, even if the Plaintiff had told the Trademark Office about The Great Bourbon Shortage of 2005-2015, this would not have excused its nonuse. Neither decreased demand for a product nor “nonuse due to ordinary changes in social or economic conditions” excuses nonuse of a trademark. Trademark Manual of Examining Procedure § 1604.1. Vagaries in the marketplace do not excuse nonuse or avoid abandonment.

For example, in *In re Moorman Mfg. Co.*, 203 U.S.P.Q 712, 1979 WL 24864 (T.T.A.B. 1979), a registrant sought renewal despite nonuse of a mark, claiming that the lack of an essential ingredient, which came from a single source, excused its nonuse. The Trademark Examiner denied the renewal, which the Assistant Commissioner affirmed, explaining

According to the terms of Section 8, the affidavit must contain a “showing” of excusable nonuse. That is to say, sufficient facts must be set forth to demonstrate clearly that nonuse is due to circumstances beyond the registrant’s control. Such a showing has not been made in the present case. Petitioner asserts that an essential ingredient of its trademarked product has not been available from its accustomed commercial source and that it has been negotiating to obtain a new source; but petitioner has not indicated the reasons for its inability to conclude successfully its negotiation for the required raw material other than to indicate that it cannot find a new source that is commercially “feasible.” Moreover, petitioner has not indicated what actions, if any, it has taken to promote the mark in the interim. In light of over five years’ nonuse of the mark, petitioner has failed to show that its withdrawal from the market is temporary.

1979 WL 24864, \*2.

The same reasoning applies here. The Plaintiffs’ dubious claim that it was unable to find wholesale bourbon for more than ten years (twice the period of nonuse in *Moorman Mfg.*) does not excuse its nonuse of the “Cowboy Little Barrel” mark.

**C. Plaintiff's trademark registration should be cancelled due to abandonment and fraud on the Trademark Office.**

A District Court may cancel a trademark registration due to abandonment or fraud on the Trademark Office. 15 U.S.C. § 1119 ("In any action involving a registered mark the court may determine the right to registration [or] order the cancelation of registrations ...").

**1. Abandonment.**

As shown in Section II.B., above, the Plaintiff's trademark is presumed abandoned as of 2008, and the Plaintiff cannot excuse eleven years of nonuse. This Court has the power to cancel trademarks for non-use. 15 U.S.C. § 1119. Because the Plaintiff's trademark was abandoned, the Defendant is entitled to summary judgment of cancellation of its trademark.

**2. Fraud.**

In addition, a registration may be cancelled upon a showing, by clear and convincing evidence, that the registrant made false declarations to the Trademark Office with intent to deceive. *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 125 (5<sup>th</sup> Cir. 1993). Intent to deceive may be inferred from false declarations filed with the Trademark Office, particularly when the registration has no credible explanation for its misrepresentation or failure to disclose material information. *Bruno Independent Living Aids, Inc. v. Acorn Mobility Services, Ltd.*, 394 F.3d 1348, 1354-55 (Fed. Cir. 2005). The more material the misrepresentation, the lower showing of intent needed. *Bristol-Myers Squibb Co. v. Rhone Poulenc Rorer, Inc.*, 326 F.3d 1226 (Fed. Cir. 2003). The failure to correct misrepresentations, even innocently made, constitute fraud if the registrant learns of the misrepresentations, benefitted from them, and knows the Trademark Office relied on them in issuing or renewing a registration. *Space Base, Inc. v. Stadis Corp.*, 17 U.S.P.Q.2d 1216 (T.T.A.B. 1990).

In a case directly on point, the Federal Circuit affirmed the cancellation, on summary judgment, of a trademark registration based on the registrant's false assertion of continued use in commerce to the Trademark Office. *Torres v. Torresella*, 808 F.2d 46 (Fed Cir. 1986). In *Torres*, the plaintiff had registered a mark "Las Torres" for wine, vermouth and champagne. The plaintiff then dropped "Las" from the label, and limited its use of "Torres" to wine. When the plaintiff filed his affidavit to renew the trademark registration, he claimed the mark was still used for wine, vermouth and champagne. In affirming the District Court's cancellation of the mark, the Federal Circuit wrote:

If a registrant files a verified renewal application stating that his registered mark is currently in use in interstate commerce and that the label attached to the application shows the mark as currently used when, in fact, he knows or should know that he is not using the mark as registered and that the label attached to the registration is not currently in use, *he has knowingly attempted to mislead the PTO*.

*Id.* at 49.

This is precisely what the Plaintiff did, not once, but twice, when it submitted verified affidavits claiming that it was using the "Cowboy Little Barrel" label when, in fact, it was not. Its registration should therefore be cancelled.

#### **IV. Conclusion.**

The undisputed facts show that the Plaintiff cannot raise a material issue as to its inability to prove two essential elements of its claims: (1) ownership of trademark rights and (2) that sale of the Defendant's product in the United States is likely to cause consumer confusion as to its origin. The same uncontested facts also raise the presumption that the Plaintiff abandoned any trademark rights it may have had in the United States long before the Defendant released Garrison Brothers Cowboy Bourbon, thereby defeating any claim of infringement and entitling the Defendant to have the Plaintiff's trademark registration cancelled.



For these reasons, this Court should grant summary judgment for Defendant Lone Star Distillery, LLC, and dismiss all of the Plaintiff's claims against it with prejudice, cancel the Plaintiff's trademark for "Cowboy Little Barrel," and award the Defendant its fees and costs of court, and such further and other relief to which the Defendant may be justly entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 12, 2016, the forgoing was served via the Court's CM/ECF notification system on:

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**Via ECF**

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**Via ECF**

/s/ M. Forest Nelson  
M. Forest Nelson

**EXHIBITS IN SUPPORT OF  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

1. Declaration of Daniel Garrison
2. Excerpts from Deposition of Allied Lomar, Inc.
3. Application to Register “Cowboy Little Barrel” (excerpt from Palatella Depo. Exhibit 3).
4. Trademark Registration for “Cowboy Little Barrel.”
5. Combined Declaration of Use and Incontestibility under Sections 8 & 15 (Palatella Depo. Exhibit 6).
6. Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9 (Palatella Depo. Exhibit 7).

# **EXHIBIT 1**

IN THE UNITED DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

ALLIED LOMAR, INC.,

Plaintiff,

v.

LONE STAR DISTILLERY, LLC d/b/a  
GARRISON BROTHERS DISTILLERY,  
and DOES 1 THROUGH 10,

Defendants.

§  
§  
§  
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§

CASE NO. 1:14-CV-01078-SS

**DECLARATION OF DANIEL GARRISON**

1. My name is Daniel (“Dan”) Garrison. I am over the age of eighteen (18) years, have never been convicted of a felony, and am otherwise competent to give this declaration.

2. I am the founder of Garrison Brothers Distillery and the manager of Defendant Lone Star Distillery, LLC.

3. Lone Star Distillery, LLC, d/b/a Garrison Brothers Distillery, is Texas’ first and oldest whiskey distillery. I am its founder. I first dreamed of making straight bourbon whiskey in Texas about fifteen years ago. I bought a working Hill Country ranch in 2004, formed an LLC in 2006, and began acquiring the necessary silos, cisterns, fermenting tanks, stills, barrel storage facilities and bottling equipment. I was distilling bourbon by January 2008, using only local water and Texas-grown corn, wheat and barley. I am currently the Vice President of the American Craft Spirits Association, which has some 250 member distilleries.

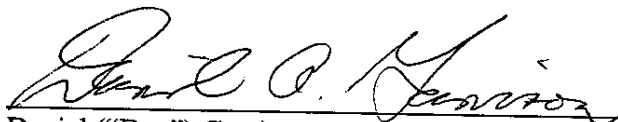
4. Garrison Brothers’ first product, an early release called “The Young Gun,” was first sold on March 2, 2010, Texas Independence Day. In 2011, Garrison Brothers made its first release of its flagship product, “Garrison Brothers Texas Straight Bourbon Whiskey.” The

distillery sells a new release every year. From 2010 to 2016, Garrison Brothers' production of bourbon increased ten-fold. The distillery has received high accolades and won many awards. It is recognized as one of the finest craft distilleries in the country.

5. After the 2013 release of Garrison Brothers Cowboy Bourbon sold out, and after it was named Micro Whiskey of the Year by the *Whisky Bible*, I received a cease-and-desist letter from a lawyer for the Plaintiff, Allied Lomar, Inc.. The letter alleged that Garrison Brothers was violating the Plaintiff's trademark in "Cowboy Little Barrel." Despite years in the business, I had never heard of a bourbon called "Cowboy Little Barrel." I searched the Internet for any actual bourbon or other alcoholic beverage sold under that name, but found nothing. To my knowledge, "Cowboy Little Barrel" bourbon has never been sold in the United States.

6. I am not aware of any ten-year wholesale bourbon shortage in the United States from the early 2000s until the mid-2010s. When I was launching my distillery, numerous distilleries offered to sell me wholesale bourbon.

7. I declare under penalty of perjury that the foregoing facts are true and correct.  
Executed June 12, 2016.

  
Daniel ("Dan") Garrison

## **EXHIBIT 2**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

ALLIED LOMAR, INC., )

)

Plaintiffs, )

vs. ) Case No. 1:14-CV-01078-SS

)

LONE STAR DISTILLERY, )

LLC D/B/A GARRISON )

BROTHERS DISTILLERY, )

)

Defendants. )

)

VIDEO DEPOSITION OF MARCI PALATELLA  
San Francisco, California  
Monday, June 6, 2016  
Volume I

Reported by:

JOANNA BROADWELL

CSR No. 10959

Job No. 2324953

PAGES 1 - 157



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

ALLIED LOMAR, INC., )

)

)

Plaintiffs, )

vs. ) Case No. 1:14-CV-01078-SS

)

LONE STAR DISTILLERY, )

LLC D/B/A GARRISON )

BROTHERS DISTILLERY, )

)

Defendants. )

)

Video deposition of MARCI PALATELLA,  
Volume I, taken on behalf of Defendants, at 275 Battery  
Street, Suite 2000, San Francisco, California,  
beginning at 8:29 a.m. and ending  
at 12:12 p.m. on Monday, June 6, 2016,  
before JOANNA BROADWELL, Certified Shorthand  
Reporter No. 10959.

1 APPEARANCES:

2  
3 For Plaintiffs:

4 GORDON & REES, LLP

5 BY: ROBERT P. ANDRIS

6 Attorney at Law

7 275 Battery Street, Ste. 2000

8 San Francisco, California 94111

9 (415) 986-5900

10  
11  
12 For Defendants LONE STAR DISTILLERY LLC:

13 BURT BARR & ASSOCIATES

14 BY: M. FOREST NELSON

15 Attorney at Law

16 P.O. Box 223667

17 Dallas, Texas 75222-3667

18 (214) 943-0012

1 (Continued Appearances - Page 2)

2  
3 For Defendants GARRISON BROTHERS:

4 GRAVES, DOUGHERTY, HEARON & MOODY

5 BY: STEVEN D. SMIT

6 Attorney at Law

7 401 Congress Avenue, Ste. 2200

8 Austin, Texas 78701

9 (512) 480-5600

10  
11 Also Present: Sean Grant, Videographer and Dan  
12 Garrison.

## INDEX

WITNESS

EXAMINATION

MARCI PALATELLA

Volume I

BY MR. NELSON

8

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Exhibit 7	Combined Declaration of Use	
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	Application for Renewal of	
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Previously Marked Exhibits

None

\* Bound separately and marked as Confidential.

CERTIFIED QUESTIONS

Page 150, Line 5 to Line 7.

1 San Francisco, California, Monday, June 6, 2016

2 8:29 a.m.

3 PROCEEDINGS

4 THE VIDEOGRAPHER: Good morning. We're on the  
5 record. The time is 8:29 a.m., and the date is  
6 June 6th, 2016. This begins the videotaped deposition  
7 of Allied Lomar Inc. pursuant to Rule 30B6. My name is  
8 Sean Grant, here with our court reporter, Joanna  
9 Broadwell. We're here from Veritext Legal Solutions at  
10 the request of counsel for defendant.

11 This deposition is being held at Gordon & Rees  
12 LLP in San Francisco, California. The caption of this  
13 case is Allied Lomar Inc. versus Lone Star Distillery,  
14 LLC, dba Garrison Brothers Distillery, Case No.  
15 1:14-CV-01078-SS.

16 Please note that audio and video recording will  
17 take place unless all parties have agreed to go off the  
18 record. Microphones are sensitive and may pick up  
19 whispers, private conversations or cellular  
20 interference.

21 At this time will counsel please identify  
22 themselves and state whom they represent.

23 MR. NELSON: Forest Nelson for the defendant.

24 MR. SMIT: Steve Smit for the defendant.

25 THE VIDEOGRAPHER: Also present?

1 MR GARRISON: Dan Garrison, Garrison Brothers.

2 MR. ANDRIS: And Robert Andris here for  
3 Plaintiff.

4 THE VIDEOGRAPHER: Witness name?

5 THE DEPONENT: Marci Palatella. I am the  
6 plaintiff.

7 THE VIDEOGRAPHER: Will the certified court  
8 reporter please swear in the witness.

9  
10 MARCI PALATELLA,  
11 having been administered an oath, was examined and  
12 testified as follows:

13

14 EXAMINATION

15 BY MR. NELSON:

16 Q Please state your name for the record.

17 A Marci Palatella.

18 Q Ms. Palatella, you've given a deposition before,  
19 correct?

20 A Yes, I have.

21 Q Have you ever testified in court before?

22 A Not that I can recall, no.

23 Q But you understand the import of a deposition,  
24 correct?

25 A Right. I understand --

1 Q You understand that this is under penalty of  
2 perjury?

3 A Uh-huh.

4 Q You're going to have to make an audible response,  
5 Ms. Palatella.

6 A Yes.

7 Q You understand that this deposition is just like  
8 the information you supply to a government agency or you  
9 supply to anybody else associated with Allied Lomar,  
10 correct?

11 A Yes.

12 Q You understand that according to what your  
13 counsel has told us, you're the person who's here to  
14 speak on behalf of Allied Lomar?

15 A Yes.

16 Q Did you have the opportunity to read the  
17 interrogatories and request for production in this case?  
18 Those are questions that we pose to you, answer the  
19 questions and then produce documents for us. Did you  
20 have a chance to read those responses?

21 A Is that the request that you gave my attorney  
22 for --

23 Q Correct.

24 A -- discovery or whatever it's called?

25 Q Yes, ma'am.



1 A Yes.

2 Q All right. And you understand that in the  
3 discovery response, your counsel said that you were the  
4 person who would provide all of the information, that  
5 any information that came from anybody else would be  
6 cumulative, but you were the one who had the personal  
7 knowledge of the operations of Allied Lomar at all  
8 material times?

9 A Yes.

10 THE REPORTER: At all "material"...

11 BY MR. NELSON:

12 Q "Times." So you understand that, just as when  
13 you submit information to the United States Patent and  
14 Trademark Office or you submit information to the TTB  
15 for a COLA as in this deposition --

16 THE REPORTER: I'm sorry. "To the TTB"...

17 BY MR. NELSON:

18 Q TTB for COLA as in the deposition you've given  
19 here and the deposition you gave in the Diageo case,  
20 that you are the one who represents, you have personal  
21 knowledge, and you're the one who's representing that  
22 all of the information you supplied is true, accurate  
23 and correct, correct?

24 A To the best of my recollection. Absolutely.

25 (Exhibit 1 was marked for identification

1 by the court reporter and is attached hereto.)

2 BY MR. NELSON:

3 Q If we could show you Exhibit No. 1, have you had  
4 the opportunity to see that document or a similar  
5 document? This is the deposition notice.

6 MR. ANDRIS: This is the one that has all of this  
7 stuff, the topics.

8 THE DEPONENT: Who issued this?

9 MR. ANDRIS: They did.

10 THE DEPONENT: Okay.

11 BY MR. NELSON:

12 Q Could you read those topics and tell me that  
13 you're going to be able and you're going to be the only  
14 person to speak on each one of those topics? Nobody  
15 else is going to speak for Allied Lomar on those topics?

16 A "The allegations in the above-captioned  
17 action" -- Do you want me to read it out loud to you?

18 THE REPORTER: A little slower for me.

19 THE DEPONENT: Do you want me to read this out  
20 loud or to myself?

21 BY MR. NELSON:

22 Q To yourself.

23 THE REPORTER: I'm sorry. I need to write every  
24 single word that we speak, so we're going to have speak  
25 one at a time.

1 THE DEPONENT: Okay. Okay.

2 BY MR. NELSON:

3 Q Read it to yourself and just represent to me that  
4 you are the person for Allied Lomar who's going to  
5 answer each of these topics.

6 A Got it. Let me -- give me a moment.

7 THE VIDEOGRAPHER: Your microphone fell off.  
8 It's better if you put it on your jacket.

9 THE DEPONENT: Not knowing what you're going to  
10 ask me, I would assume I'd be able to answer most of  
11 these.

12 BY MR. NELSON:

13 Q Well, is there any topic that you believe you  
14 would be unable to answer?

15 A Broadly, no. Specifically coming from you,  
16 possibly. I mean, I'm...

17 (Exhibit 2 was marked for identification  
18 by the court reporter and is attached hereto.)

19 (Exhibit 3 was marked for identification  
20 by the court reporter and is attached hereto.)

21 BY MR. NELSON:

22 Q Now, if we could look at Exhibit No. 2. My  
23 assistant was kind enough to put these basically in  
24 order from the questioning I'm going to ask you.

25 A Okay.

1 Q And if you look at these documents, you will  
2 notice on the documents at the bottom that there is a  
3 number, the bottom right-hand corner. Do you see the  
4 number?

5 A Uh-huh. Uh-huh.

6 Q I will try to make reference to the number so  
7 that we can go along with it. I will try to make my  
8 questions generic.

9 A Okay.

10 Q So there won't be any disclosures that will --  
11 that you will be able to make some request to have  
12 Mr. Garrison leave. Okay?

13 A Uh-huh.

14 Q Now, how long have you been in the distillery  
15 business?

16 A Distillery or distilling?

17 Q Distillery --

18 A Liquor and wine and --

19 Q Distilled spirits.

20 A In the distilled spirits and wine industry, about  
21 30 years.

22 Q Do you know of any other company that reserves  
23 trade names similar to Allied Lomar?

24 A What do you mean by "reserved"?

25 Q Well, if we can take a look at the exhibit Allied

1 5915, that's the first page.

2 A Uh-huh.

3 Q And you can take those things out of the sleeves.  
4 My secretary put it in the sleeves so that --

5 A It's okay.

6 Q -- I wouldn't need to. On this document -- and  
7 this is dated September the 1st, 2015, there are 25  
8 marks. Do you see those, twenty-five trademarks?

9 A No, I don't, because you've got them -- you don't  
10 have them turned around. You've got both of them in the  
11 same sleeve. Okay. Okay.

12 Q These are 25 -- these are 25 trademarks that are  
13 held in the name of Allied Lomar, correct?

14 A Yes, they are.

15 Q Can you tell me out of these 25 names  
16 approximately how many of them you are now selling  
17 product in?

18 A I'm going to answer you, and I'd like you to let  
19 me complete my answer. Okay? I understand your role.  
20 You need to understand mine. There's been a whiskey  
21 shortage for the last 10 or 11 years. All of these  
22 products we have sold, other than two which are fairly  
23 new trademarks. There hasn't been -- our whole premise  
24 for our business was old and rare whiskey, and there  
25 hasn't been any. So some of these are not currently in

1 the marketplace.

2 Q I understand what you're saying, but you're -- if  
3 I take your answer, you're saying that there hasn't been  
4 bourbon in the market, correct?

5 A There hasn't been the kind of bourbon that we  
6 were producing, correct.

7 Q A lot of these products are vodka and gin. Are  
8 you selling any of those products?

9 A Where's the gin?

10 Q If you look at the first page, there's a  
11 trademark here of Acqua.

12 A Acqua, yes.

13 Q Are you selling in that market?

14 A We have been selling it.

15 Q Are you selling it today?

16 A We don't have orders for it today, but we have it  
17 on our price list and we've sold it historically.

18 Q Blue Palm?

19 A We don't have the product in the market today,  
20 but we sold it historically.

21 Q Immaculata?

22 A Immaculata is a new trademark and it's part of  
23 our tequila portfolio.

24 Q Lost Barrel?

25 THE REPORTER: I'm sorry. Repeat it.

1 BY MR. NELSON:

2 Q Lost Barrel.

3 A You know what? Excuse me. I'd like to ask that  
4 Dan leave.

5 Q Then I won't ask about that one.

6 A Okay.

7 MR. SMIT: The objection is whether or not you  
8 sell the product?

9 THE DEPONENT: How about that I have product in  
10 process that's coming to market, and I feel it's  
11 confidential and proprietary.

12 BY MR. NELSON:

13 Q Jazz Club?

14 A We don't currently have product in the market  
15 today.

16 THE REPORTER: Once again, please.

17 THE DEPONENT: We do not have product in the  
18 market today. We have sold it historically. Do not  
19 have product in the market today.

20 BY MR. NELSON:

21 Q Blues Club?

22 A Same thing. We've sold it historically. There  
23 hasn't been supply, and we do not have it in the market  
24 today.

25 Q Do you know any other company that holds this

1 many trademarks without product in the market?

2 A Every major supplier.

3 Q Can you give me the name of just one company?

4 A Look up Diageo's trademarks and see how many they  
5 have and tell me how many of those products are actually  
6 in the marketplace today.

7 Q Any company besides Diageo?

8 A I don't know. I don't snoop around in other  
9 people's trademarks. But I'm not holding them. They're  
10 my trademarks to use, which I do use.

11 Q Do you know any other people who are selling  
12 products similar to these trademarks?

13 A At this time, yes.

14 Q Do you know any people that sold these products  
15 before you offered the trademarks?

16 A No.

17 Q Now, on these 25 trademarks, do you file the  
18 necessary papers with the TTB associated with COLA?

19 A When they're ready to be released in the domestic  
20 market. I follow all of rules.

21 Q So if we went onto the TTB site --

22 A Uh-huh.

23 Q We would be able to find information regarding  
24 your filings for each one of these trademarks?

25 THE REPORTER: I'm sorry. "Regarding your"...



1 BY MR. NELSON:

2 Q Regarding these 25 trademarks?

3 A No, they're only required if I sell them here in  
4 the domestic market.

5 Q Out of these 25 trademarks, how many have you  
6 sold in the foreign market and not in the domestic  
7 market?

8 A Most of these are coming into the domestic  
9 market.

10 Q Over the last 10 years, can you tell me which one  
11 of these trademarks you've sold product --

12 A In the last 10 years there's been a dramatic  
13 bourbon and whiskey shortage which is well documented.  
14 So I have not been able to get -- I don't make bourbon  
15 and whiskey myself yet, and I have not been able to get  
16 supply.

17 Q Well, can you name just one of these in the last  
18 20 -- in the last 10 years that you've sold out of these  
19 25 markets?

20 MR. ANDRIS: I think that's been answered. Asked  
21 and answered.

22 MR. NELSON: I think her answer was she hasn't  
23 been able to get bourbon.

24 BY MR. NELSON:

25 Q Can you tell me, out of these 25, are there any

1 of these that you've sold in the last 10 years, any of  
2 the product?

3 A I have orders -- yes, absolutely. The ones that  
4 are non-bourbon. Champion tequila, and we have orders  
5 right now for Cowboy and for Stitzel.

6 Q That's it? Only the -- only the vodkas and gins?  
7 What did you say, two tequilas and then Cowboy and  
8 Stitzel, nothing else?

9 A There's been a bourbon shortage. There isn't any  
10 bourbon to be had by people who don't make it  
11 themselves.

12 Q I just want to confirm that that's the answer.

13 A That is the answer. That's the answer.

14 Q In your experience in the industry, is selling  
15 limited product the standard practice to maintain a  
16 trademark?

17 A What do you mean by "limited product"?

18 Q Well, you said that you hadn't sold any of these  
19 products in the last 10 years except you were getting  
20 ready to sell Stitzel and Cowboy.

21 A No, what I said is I hadn't sold -- I hadn't had  
22 supply in the last 10 years.

23 Q So you had sales?

24 A We have orders. We don't -- we have not been  
25 able to fulfill the orders.

1 Q So I'm not going to see any bill of ladings? I'm  
2 not going to see any invoices where there was payment?  
3 I'm not going to see any excise taxes or anything like  
4 that --

5 A You aren't --

6 Q -- associated with these 25 marks?

7 A On the ones we could get juice for, you will,  
8 yes.

9 Q And if it's not in the records that have been  
10 produced to us, then there haven't been any sales,  
11 correct?

12 A Of which items? Since I have 25 trademarks,  
13 let's go item by item.

14 Q I'm just telling you that -- let's take Cowboy.

15 A Okay.

16 Q If I haven't seen anything by way of excise tax  
17 as anything associated with payments to the Federal  
18 Government, to the Department of Customs, anything like  
19 that, then there haven't been sales; is that a fair  
20 statement?

21 A We are waiting to release Cowboy.

22 Q In the last 10 years, if you did not produce any  
23 documents to us showing any sales in the last ten years  
24 either through excise tax payments or through custom  
25 records or the TTB records, then can we safely assume

1 that there weren't any sales in the last 10 to 11 years?

2 A Excuse me. You know what? Yes. You can safely  
3 assume that to the best of my knowledge.

4 MR. ANDRIS: Keep in mind that your microphone is  
5 on, and even if you whisper it's going to be coming  
6 through, so we have to go out if you really want to  
7 talk.

8 THE DEPONENT: No, that's okay.

9 MR. ANDRIS: And a question was pending at that  
10 time. He had asked you a question, and it's technically  
11 not proper for you to ask me any questions while it's  
12 pending. Okay?

13 THE DEPONENT: Okay. Got it.

14 BY MR. NELSON:

15 Q And from 2014 -- let's take from the end of 2013  
16 back 10 years to -- that would be 2003, you didn't have  
17 any pending litigation, correct? And when I say "you,"  
18 I'm talking about Allied Lomar. Allied Lomar wasn't  
19 involved in any litigation between 2003 and the end of  
20 2013, were they?

21 MR. ANDRIS: Regarding trademarks?

22 BY MR. NELSON:

23 Q Regarding trademarks.

24 A No, not that I can recall.

25 Q And you have no plant, correct? No distillery?

1 Allied Lomar has no distillery operation?

2 A Allied Lomar is building distillery right now.

3 Q Between 2003 and 2015, Allied Lomar had no  
4 distillery?

5 A That is correct.

6 Q And even as we sit here today, Allied Lomar has  
7 no functioning distillery?

8 A You are correct.

9 Q All right. You weren't trying to modernize any  
10 plant equipment or anything like that? That in no way  
11 had -- had a basis for you being unable to sell product  
12 during the 2003 to the 2016 period?

13 A Correct.

14 Q I take it there wasn't any regulatory barriers?  
15 Nobody in the Federal Government was saying, "You can't  
16 sell this product today"? And that would be between the  
17 time frame of 2003 up until 2015?

18 A What does 2003 have to do with this?

19 Q I just need to know that timeframe. Have you got  
20 anything to indicate that the Federal Government or any  
21 other state agency was precluding you from selling  
22 product between 1995 and 2015?

23 A I don't think so.

24 Q And you didn't have any employees' strikes or  
25 anything like that that would have precluded Allied

1 Lomar from selling product between 1995 and 2015?

2 A Sorry. Why don't you repeat that. You're kind  
3 of asking a different question now.

4 Q You had no employee strikes -- there wasn't any  
5 labor problems that precluded Allied Lomar from being  
6 able to sell bourbon between 1995 and 2015?

7 A What does 1995 have to do with this? I'm sorry,  
8 I'm not clear.

9 Q During that timeframe, did you have anything that  
10 would have precluded you from selling that product  
11 related to labor problems?

12 A From 1995? I don't recall. This is 30 -- how  
13 long ago is that? Twenty years ago? That I can recall,  
14 but...

15 Q When you purchase your bourbon, do you purchase  
16 the bourbon in the barrel or do you purchase the bourbon  
17 as what they call juice?

18 A Juice.

19 Q All right. So there wasn't any problems  
20 associated with your ability or inability to get barrels  
21 that would have precluded from selling the product  
22 between 1995 and 2013, correct?

23 A You're asking two completely separate questions.  
24 Let's break it down, okay, please? 1995, tell me about  
25 1995.

1 Q I'm giving you the time frame. My question is  
2 going to be from the timeframe of 1995 through 2015.

3 A So we were 2003 to 2015. Now we're going to  
4 1995, so I'm trying to figure out what you're asking me.

5 Q During that time frame from 1995 to 2015, there  
6 wasn't anything associated with barrels that precluded  
7 you from being able to sell bourbon?

8 MR. ANDRIS: I'm not clear on what you mean,  
9 "associated with barrels."

10 BY MR. NELSON:

11 Q Well, you buy your bourbon you said in juice  
12 format, correct? Do they ship it to you by barrels?

13 A Excuse me. Sometimes I buy it in juice format  
14 and sometimes I buy it by the barrel.

15 Q When they sell it to you by juice format, it  
16 comes in tanks, correct?

17 A I -- you know what? Sometimes yes, sometimes no.

18 Q Well, was there any barrel shortage that  
19 precluded you from being able to sell the bourbon  
20 between 1995 and 2015?

21 A There is a barrel shortage.

22 Q Did it preclude you from selling product between  
23 1995 and 2015?

24 A In a 20-year period?

25 Q Any time during that 20-year period.

1           A     You're asking about two very different eras. So  
2     I understand what you're asking me. From 1995 to  
3     2005 -- let me give you -- well, hold on. You want my  
4     answer? I'm going to tell you how this works in our  
5     business. 1995 to 2005 there was not a barrel shortage.  
6     The last 10 years there has been a dramatic bourbon but  
7     and whiskey shortage including building up to a barrel  
8     shortage.

9           Q     And I'll start asking the questions in two  
10    splits. Between 1995 --

11           THE REPORTER: I'm sorry. A little slower for  
12    me. "I'll try to ask the question." Yes, sir?

13    BY MR. NELSON:

14           Q     In two ways. Between 1995 and 2005, no barrel  
15    shortage, no shortage of bourbon precluded you from  
16    selling product?

17           A     False.

18           Q     Between 1995 and 2005? I thought you just  
19    testified that between that 10-year window, 1995 to  
20    2005, there wasn't any barrel shortage and there wasn't  
21    any bourbon shortage.

22           A     Well, actually, there was a bourbon shortage. It  
23    started probably about 2004, 2005 for us. We --  
24    suppliers that we traditionally had did not have.

25           Q     Then we'll take the time from 1995 to 2003.



1 MR. ANDRIS: Could we go off the record for 30  
2 seconds while I walk outside with my client for just a  
3 second?

4 MR. NELSON: Okay.

5 THE VIDEOGRAPHER: Going off the record. The  
6 time is 8.49 a.m.

7 (Off the record from 8:49 a.m. to  
8 8:51 a.m.)

9 THE VIDEOGRAPHER: Back on the record. The time  
10 is 8:51 a.m.

11 BY MR. NELSON:

12 Q I think your prior testimony, Ms. Palatella, you  
13 indicated that you did not have a distillery plant,  
14 correct? Allied Lomar does not have a distillery plant.  
15 You said they were in the process of building one,  
16 correct?

17 A Correct.

18 Q You understand under the law that you cannot take  
19 delivery of barrels unless you are a distillery plant,  
20 correct?

21 A Yes, I'm aware of that.

22 Q So that if you were getting bourbon during this  
23 timeframe, it would have had to come to you as juice  
24 through a tank, correct?

25 MR. ANDRIS: What time period are we talking

1 about?

2 BY MR. NELSON:

3 Q 1995 to 2015. You haven't had a plant at any  
4 time during that time frame, have you?

5 A No, I haven't.

6 Q So you had to take it in the form of a tank,  
7 correct?

8 A I don't take it personally.

9 Q I understand. But to ship it or to have it sent  
10 to Allied Lomar, it would have had to come through a  
11 tank, correct?

12 A Incorrect.

13 Q And I think before we broke, your testimony was,  
14 you haven't been able to sell bourbon, or there hasn't  
15 been bourbon available, or there's been a barrel  
16 shortage from 2004 on; is that correct?

17 A Let's break that up. There's been a dramatic  
18 bourbon shortage for about the -- from about 2005 to  
19 2015. The barrel shortage happened during that process,  
20 but I can't tell you exactly when that began.

21 Q All right. So you haven't been able to sell any  
22 bourbon product from 2004 basically up until today's  
23 date, or 2015, correct?

24 A Probably 2004. I don't -- I think we still were  
25 able to get a little bit of supply then.

1 Q All right. Then from the summer of 2004 up until  
2 2016, you haven't been able to procure product to sell?  
3 And when I say "product," I mean bourbon.

4 A Why the summer?

5 Q Well, you said in 2014 you might have got some,  
6 so I figured I was going to split the year in half.

7 A Okay. Well, I'm not -- I'm not -- I can't really  
8 recall the exact date it happened.

9 Q All right. So sometime during the 2004 up until  
10 2000 -- the end of 2015, you had no bourbon product to  
11 sell? "You" being Allied Lomar.

12 A Why don't we say 2005 to 2015 we had nothing to  
13 sell, yes.

14 Q All right. So -- and can we agree that when I  
15 say "you," I'm referring to Allied Lomar; I'm not  
16 referring to you, personally? Okay?

17 A Right, yes.

18 Q Without giving me the name of the sources, can  
19 you tell me now many sources you had for bourbon between  
20 the time frame of 1995 up through 2004?

21 A As it relates to...

22 Q Bourbon?

23 A No, is it -- well, as it relates to these -- to  
24 Cowboy?

25 Q Yes.

1 A Incorrect.

2 Q You have Internet advertising?

3 A We have a website.

4 Q If you look at Production No. 82, Request for  
5 Production No. 82.

6 A I believe we have a website up. 82?

7 Q That's what I was going to ask about, because at  
8 the time these were answered -- and we haven't got any  
9 supplement to indicate that there were any newspaper,  
10 magazine, newsletter, trade journal, website or other  
11 media coverage of Cowboy Little Barrel.

12 A So maybe the website may not be active yet.  
13 They've been redoing it, so it may not be up and active.  
14 No, when you don't have product actively being sold, you  
15 don't advertise it until it's being sold unless you know  
16 you's are going to get product. So now we've been  
17 advertising it.

18 Q No ratings, no awards, nothing associated with  
19 Cowboy Little Barrel?

20 A No juice, no supply, no tasting.

21 Q Production No. 83, which is on the next page, we  
22 asked for information regarding any media agency you  
23 hired, and there wasn't anything produced. Still  
24 accurate? No media company has been hired to assist in  
25 marketing Cowboy Little Barrel ever?

1 ordered the labels?

2 A Again, that's confidential.

3 Q So you believe that you were in the process of  
4 getting this product to market at the time that you  
5 filed the lawsuit?

6 A Yes.

7 Q Do you understand the difference between a  
8 blended whiskey and straight bourbon?

9 A Yes, I do.

10 Q What are the variances?

11 A A blended whiskey, that's Kentucky blended  
12 whiskey contains a percentage of bourbon and the rest  
13 other whiskey material.

14 Q What is the other whiskey material?

15 A So are you asking me for my personal brand?

16 Q What can make up the other -- what can make up  
17 the other whiskey material?

18 A By law?

19 Q Yes.

20 A Other grain spirits, aged or not aged.

21 Q Do they have to be neutral? Do you know what  
22 neutral grain spirit is, a neutral spirit is?

23 A Yes, I do.

24 Q Okay. In your understanding, from a blended  
25 whiskey, does it have to be neutral, the other portion?

1 Brothers Cowboy Little Barrel straight bourbon  
2 or American -- pardon me, Garrison Brothers Cowboy  
3 bourbon, straight, and Cowboy Little Barrel straight  
4 bourbon. Nobody ever said there was confusion with  
5 those two products, right?

6 A Incorrect.

7 Q So you have somebody during the timeframe that  
8 you were selling this Cowboy Little Barrel overseas say  
9 that they were confused between your overseas product  
10 and between what Garrison Brothers were selling here in  
11 the United States?

12 A Garrison Brothers didn't have Cowboy when I was  
13 selling it overseas. They weren't even here. To the  
14 best of my knowledge, I only -- I mean, I only found out  
15 about them in 2014. So I don't know what they were  
16 doing prior to that. I can't imagine there would be  
17 confusion if they didn't exist.

18 Q And you've never had any product since -- or  
19 you've never had any blended whiskey product on the  
20 shelf here in the United States, correct?

21 A Not yet.

22 Q And you haven't had any Cowboy Little Barrel  
23 foreign product on a shelf here in the United States,  
24 correct?

25 A Cowboy Little Barrel foreign product here? I

1 can't answer that. I don't know.

2 Q Well, did you ever sell any Cowboy Little Barrel,  
3 the stuff that you had from 1995 up to 2004? Did you  
4 ever sell any of that in the United States?

5 A No.

6 Q All right. So it was never on a shelf in the  
7 United States, Cowboy Little Barrel that you sold  
8 overseas, and the Cowboy Little Barrel blended whiskey  
9 has never been on the shelf here in the United States,  
10 correct?

11 A To this very date? Correct.

12 Q So no retailer, no client, no consumer, no  
13 restaurants called you up and said they were confused  
14 between Cowboy Little Barrel blended whiskey and  
15 Garrison Brothers straight bourbon ever?

16 A I think there's huge confusion in the market.

17 Q No one's called you and said there was confusion?

18 A Yes, they have called me.

19 Q How many people have called you? I don't need  
20 the names right now, but how many have called you?

21 A I've had discussions with people who think there  
22 is clear confusion between someone who used to be  
23 Garrison this big and Cowboy this big, and now it's the  
24 reverse. Believe me, it was brought to my attention.

25 Q Well, you said -- you just said "Cowboy this big

1           A    We didn't have product.  There wasn't any  
2   available.

3           Q    Did you make any declarations stating that there  
4   wasn't any product available in 2009?

5           A    No.  We were using it.  We were using the mark in  
6   commerce.  That's what this says here.  "Did you use the  
7   mark in commerce?"  We did use it in commerce.

8           Q    But you had nothing to sell, correct?

9           A    We didn't know when we'd have product to sell,  
10   but I assumed it would be any time because we have very  
11   good relationships.

12          Q    Then let me ask you this:  How were you using the  
13   product in commerce?

14          A    We were promoting it.  It was on our price list.  
15   It was something discussed in meetings.  It was a  
16   product that we advertised, and if you want to ask me  
17   more, the wonderful Mr. Garrison needs to leave the  
18   room.  Sorry to him.

19          Q    So basically your answer is, it's in commerce  
20   because you were promoting a product that you couldn't  
21   sell but you hoped one day to be able to sell.

22          A    Not one day.  I thought that it would be  
23   imminent.  I thought that we would have product in  
24   the -- you know, there would be product any day.  There  
25   always was.



1 MR. ANDRIS: We're getting pretty close, Counsel.

2 MR. NELSON: Yeah, we're out of here. And we're  
3 just recessing.

4 THE VIDEOGRAPHER: This concludes today's  
5 videotaped deposition of Allied Lomar Inc. pursuant to  
6 Rule 30B6. We're off the record at 12:13 p.m. Thank  
7 you. Please take off the microphones.

8 THE REPORTER: Could I just ask, do you need a  
9 copy, sir?

10 MR. ANDRIS: Yes, please.

11

12

13 (TIME NOTED: 12:12 p.m.)

14

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1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby  
3 certify:

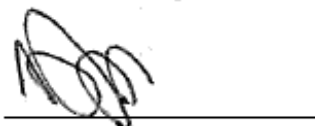
4 That the foregoing proceedings were taken  
5 before me at the time and place herein set forth;  
6 that any witnesses in the foregoing proceedings,  
7 prior to testifying, were administered an oath; that  
8 a record of the proceedings was made by me using  
9 machine shorthand which was thereafter transcribed  
10 under my direction; that the foregoing transcript is  
11 a true record of the testimony given.

12 Further, that if the foregoing pertains to  
13 the original transcript of a deposition in a Federal  
14 Case, before completion of the proceedings, review  
15 of the transcript [ ] was [ ] was not requested.

16 I further certify I am neither financially  
17 interested in the action nor a relative or employee  
18 of any attorney or any party to this action.

19 IN WITNESS WHEREOF, I have this date  
20 subscribed my name.

21  
22 Dated:



23  
24 JOANNA BROADWELL

25 CSR No. 10959

## **EXHIBIT 3**

## UNITED STATES PATENT AND TRADEMARK OFFICE

<b>SERIAL NO.</b> 78/047390 Allied Lomar, Inc.		<b>PAPER NO.</b>	
<b>APPLICANT</b>		<b>Commissioner for Trademarks</b> 2900 Crystal Drive Arlington, VA 22202-3513 www.uspto.gov	
<b>MARK</b> COWBOY LITTLE BARREL		<b>1. Filing Date, serial number, mark and Applicant's name.</b>	
<b>ADDRESS</b> MARTIN F MAJESTIC FINNEGAN HENDERSON FARABOW ET AL 1300 I ST NW WASHINGTON DC 20005-3315		<b>ACTION NO.</b> 02	<b>2. Mailing date of this action.</b>
		<b>MAILING DATE</b> 04/30/02	<b>3. Examining Attorney's name and Law Office number.</b>
		<b>REF. NO.</b> 08587.0002	<b>4. Your telephone number and ZIP code.</b>
<b>FORM PTO-1525 (5-90)</b>		<b>U.S. DEPT. OF COMM. &amp; TM OFFICE</b>	

RE: Serial Number: 78/047390

☒ The examining attorney has searched the Office records and has found no similar registered mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 704.02.

☐ 1. Action on this application is suspended pending the disposition of:

☐ Cancellation No(s).

☐ Opposition No(s).

☐ Civil Action No(s).

☐ Concurrent Use No(s).

If the applicant is a party to the above proceeding, the applicant should advise the Examining Attorney of the outcome of the proceeding when it is terminated.

☒ Application Serial No(s). 76-090172 and 75-680188.

Since applicant's effective filing date is subsequent to the effective filing date of the above-identified application(s), the latter, if and when it registers, may be cited against this application. See 37 C.F.R. §2.83. A copy of information relevant to this pending application(s) is attached was sent previously.

The applicant may request that the application be removed from suspension by presenting arguments related to the potential conflict between the relevant applications or other arguments related to the ground for suspension. The applicant's election to present or not to present arguments at this time will not affect the applicant's right to present arguments later.

Tracy Whittaker-Brown  
EXAMINING ATTORNEY NAME

EXAMINING ATTORNEY SIGNATURE

111  
LAW OFFICE

(703) 308-9111, ext. 167  
PHONE

Form PTOL-373 (Rev. 8-94)

TRAMII GENERAL QUERY AS OF: 06/10/03 15:08:44

SERIAL NUMBER: 75680188 FILING DATE: 05/03/1999  
 REG. NUMBER: 0000000 REG. DATE:  
 REGISTER: PRINCIPAL MARK TYPE: TRADEMARK  
 FILED USE: NO CURRENTLY USE: NO AMENDED USE: NO  
 FILED ITU: YES CURRENTLY ITU: YES AMENDED ITU: NO  
 FILED 44D: NO CURRENTLY 44D: NO AMENDED 44D: NO  
 FILED 44E: NO CURRENTLY 44E: NO AMENDED 44E: NO

EXAMINER: 75598-EHARD, ANDREW  
 LO ASSIGNED: 101  
 LOCATION: 900-FILE REPOSITORY (FRANCONIA)  
 DATE IN LOC: 11/08/2002  
 CHRG TO LOC: NONE  
 CHRG TO: NONE  
 STATUS: 606 - ABANDONED - NO STATEMENT OF USE FILED  
 STATUS DATE: 08/29/2002  
 A/R EXAMINER: NO A/R EXAMINER ASSIGNED

EXMR LO: 101

PUB DATE: 06/06/2000 DATE ABANDONED: 08/29/2002 DATE CANCELLED:  
 SECTION 8: NO SECTION 15: NO ASSIGNMENT: NO  
 RENEWAL FILED: NO RENEWAL DATE: DATE AMENDED REG:  
 CLASSES ACTIVE: 01

MARK: COWBOY WHISKEY

CURRENT OWNER INFORMATION  
 PARTY TYPE: 20-OWNER AT PUBLICATION - FIRST NAME  
 NAME: Small, Stephen Bradley  
 ADDRESS: Box 414678  
 KANSAS CITY MISSOURI 641414678  
 ENTITY: 01-INDIVIDUAL  
 CITIZENSHIP: UNITED STATES

## GOODS AND SERVICES

The following symbols indicate that the goods and services have been amended after registration of the Mark.

Double parenthesis ((.)) identify any "less goods";  
 Single brackets [...] indicate deleted goods; and,  
 Single asterisks \*..\* identify additional (new) wording in the goods.

FOR: Alcoholic beverages, namely, whiskey  
 INT. CLASS 033 (U.S. CLASSES 047 AND 049)  
 70FIRST USE USE IN COMMERCE CLASS STATUS: 6

## MISCELLANEOUS INFORMATION / STATEMENTS

SECTION 2F: NO SECTION 2F IN PART: NO  
 DISCLAIMER WITH PREDETERMINED TEXT:  
 "WHISKEY"

## PROSECUTION HISTORY

DATE	ENT CD	ENT TYPE	DESCRIPTION	ENT NUM	PRCD NUM
11/07/02	ABN6	S	ABANDONMENT - NO USE STATEMENT FILED	016	000000
03/25/02	MAIL	I	PAPER RECEIVED	015	000000
03/22/02	MAIL	I	PAPER RECEIVED	014	000000
03/12/02	EX3G	S	EXTENSION 3 GRANTED	013	000000
02/28/02	EXT3	S	EXTENSION 3 FILED	012	000000
09/04/01	EX2G	S	EXTENSION 2 GRANTED	011	000000
08/27/01	EXT2	S	EXTENSION 2 FILED	010	000000
04/04/01	EX1G	S	EXTENSION 1 GRANTED	009	000000

Page: 1

\*\*\* User: twhittaker \* Serial Number: 76090172 \*\* 6/22/01 1:05:48 PM \*

## BARREL / LITTLE BATCH

Mark

BARREL / LITTLE BATCH

Pseudo Mark

BARREL LITTLE BATCH

Goods and Services

IC 033. US 047 049. G & S: ALCOHOLIC BEVERAGES, NAMELY, DISTILLED SPIRITS

Mark Drawing Code

(1) TYPED DRAWING

Serial Number

76090172

Filing Date

July 17, 2000

Filed ITU

FILED AS ITU

Owner Name and Address

(APPLICANT) OLDE ST. NICK DISTILLERY, INC. CORPORATION CALIFORNIA 330  
PRIMROSE ROAD SUITE 512 BURLINGAME CALIFORNIA 94010

Type of Mark

TRADEMARK

Register

PRINCIPAL

Live Dead Indicator

LIVE

\*\*\* Search: 10 \*\*\* Document Number: 2 \*\*\*



## UNITED STATES PATENT AND TRADEMARK OFFICE

<b>SERIAL NO.</b> 78/047390 Allied Lomar, Inc.		<b>APPLICANT</b> Allied Lomar, Inc.		<b>PAPER NO.</b>	
<b>MARK</b> COWBOY LITTLE BARREL		<b>ADDRESS</b> Allied Lomar, Inc. 330 Primrose Road, Suite 512 Burlingame CA 94010		<b>ACTION NO.</b> 01	<b>ADDRESS:</b> Commissioner for Trademarks 2900 Crystal Drive Arlington, VA 22202-3513 www.uspto.gov  If no fees are enclosed, the address should include the words "Box Responses - No Fee."
				<b>MAILING DATE</b> 06/25/01	
				<b>REF. NO.</b>	
FORM PTO-1525 (5-90)		U.S. DEPT. OF COMM. PAT. & TM OFFICE		Please provide in all correspondence:  1. Filing Date, serial number, mark and Applicant's name. 2. Mailing date of this Office action. 3. Examining Attorney's name and Law Office number. 4. Your telephone number and ZIP code.	

**A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID ABANDONMENT.** For your convenience and to ensure proper handling of your response, a label has been enclosed. Please attach it to the upper right corner of your response. If the label is not enclosed, print or type the Trademark Law Office No., Serial No., and Mark in the upper right corner of your response.

RE: Serial Number: 78/047390

The assigned examining attorney has reviewed the referenced application and determined the following.

Prior Pending Applications

Although the examining attorney has searched the Office records and has found no similar *registered* mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), the examining attorney encloses information regarding pending Application Serial Nos. 76-090172 and 75-680188. 37 C.F.R. Section 2.83.

There may be a likelihood of confusion between the applicant's mark and the mark in the above noted application under Section 2(d) of the Act. The filing date of the referenced application precedes the applicant's filing date. If the earlier-filed application matures into a registration, the examining attorney may refuse registration under Section 2(d).

If the applicant believes that there is no potential conflict between this application and the earlier-filed application, the applicant may present arguments relevant to the issue in a request to remove the application from suspension. The election to file or not to file such a request at this time in no way limits the applicant's right to address this issue at a later point.

Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513  
www.uspto.gov

Jul 16, 2003

**NOTICE OF PUBLICATION UNDER 12(a)**

- |                                     |                                     |
|-------------------------------------|-------------------------------------|
| 1. Serial No.:<br>78/047,390        | 2. Mark:<br>COWBOY LITTLE BARREL    |
| 3. International Class(es):<br>33   |                                     |
| 4. Publication Date:<br>Aug 5, 2003 | 5. Applicant:<br>Allied Lomar, Inc. |

The mark of the application identified appears to be entitled to registration. The mark will, in accordance with Section 12(a) of the Trademark Act of 1946, as amended, be published in the Official Gazette on the date indicated above for the purpose of opposition by any person who believes he will be damaged by the registration of the mark. If no opposition is filed within the time specified by Section 13(a) of the Statute or by rules 2.101 or 2.102 of the Trademark Rules, the Commissioner of Patents and Trademarks may issue a certificate of registration.

Copies of the trademark portion of the Official Gazette containing the publication of the mark may be obtained from:

The Superintendent of Documents  
U.S. Government Printing Office  
PO Box 371954  
Pittsburgh, PA 15250-7954  
Phone: (202) 512-1800

By direction of the Commissioner.

Correspondence Address:

MARTIN F MAJESTIC  
FINNEGAN HENDERSON FARABOW ET AL  
1300 I ST NW  
WASHINGTON DC 20005-3315

TMP&I



## **EXHIBIT 4**

Generated on: This page was generated by TSDR on 2014-07-08 15:21:02 EDT

Mark: COWBOY LITTLE BARREL

US Serial Number: 78047390      Application Filing Date: Feb. 08, 2001  
US Registration Number: 2777811      Registration Date: Oct. 28, 2003  
Register: Principal  
Mark Type: Trademark  
Status: The registration has been renewed.  
Status Date: Oct. 09, 2013  
Publication Date: Aug. 05, 2003

### Mark Information

Mark Literal Elements: COWBOY LITTLE BARREL  
Standard Character Claim: No  
Mark Drawing Type: 1 - TYPESET WORD(S) /LETTER(S) /NUMBER(S)

### Goods and Services

Note: The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((...)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks "\*" identify additional (new) wording in the goods/services.

For: Bourbon Whiskey  
International Class(es): 033 - Primary Class      U.S Class(es): 047, 049  
Class Status: ACTIVE  
Basis: 1(a)  
First Use: Aug. 31, 1995      Use in Commerce: Aug. 31, 1995

### Basis Information (Case Level)

Filed Use: Yes	Currently Use: Yes	Amended Use: No
Filed ITU: No	Currently ITU: No	Amended ITU: No
Filed 44D: No	Currently 44D: No	Amended 44D: No
Filed 44E: No	Currently 44E: No	Amended 44E: No
Filed 66A: No	Currently 66A: No	
Filed No Basis: No	Currently No Basis: No	

### Current Owner(s) Information

Owner Name: Allied Lomar, Inc.  
Owner Address: 401 California Drive  
Burlingame, CALIFORNIA 94010  
UNITED STATES  
Legal Entity Type: CORPORATION      State or Country Where Organized: CALIFORNIA

### Attorney/Correspondence Information

Attorney of Record  
Attorney Name: Barbara L. Friedman      Docket Number: 27251.1  
Attorney Primary Email: ipfilings@hansonbridgett.com      Attorney Email: Yes

Address: \_\_\_\_\_

Authorized: \_\_\_\_\_

**Correspondent**

**Correspondent** Allied Lomar, Inc.  
**Name/Address:** 401 California Drive  
 Burlingame, CALIFORNIA 94010  
 UNITED STATES

**Phone:** 650-696-1700**Fax:** 650-342-9003**Correspondent e-mail:** [julie@inbeverage.com](mailto:julie@inbeverage.com)

**Correspondent e-mail** Yes  
**Authorized:**

**Domestic Representative - Not Found****Prosecution History**

Date	Description	Proceeding Number
Oct. 09, 2013	NOTICE OF ACCEPTANCE OF SEC. 8 & 9 - E-MAILED	
Oct. 09, 2013	REGISTERED AND RENEWED (FIRST RENEWAL - 10 YRS)	76533
Oct. 09, 2013	REGISTERED - SEC. 8 (10-YR) ACCEPTED/SEC. 9 GRANTED	76533
Oct. 07, 2013	REGISTERED - COMBINED SECTION 8 (10-YR) & SEC. 9 FILED	76533
Oct. 09, 2013	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	76533
Oct. 07, 2013	TEAS SECTION 8 & 9 RECEIVED	
Oct. 07, 2013	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Jun. 03, 2013	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Nov. 05, 2009	REGISTERED - SEC. 8 (6-YR) ACCEPTED & SEC. 15 ACK.	64591
Nov. 04, 2009	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	64591
Oct. 26, 2009	TEAS SECTION 8 & 15 RECEIVED	
Jul. 31, 2008	CASE FILE IN TICRS	
Feb. 20, 2007	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Oct. 28, 2003	REGISTERED-PRINCIPAL REGISTER	
Aug. 05, 2003	PUBLISHED FOR OPPOSITION	
Jul. 16, 2003	NOTICE OF PUBLICATION	
Jun. 10, 2003	APPROVED FOR PUB - PRINCIPAL REGISTER	
Apr. 30, 2002	LETTER OF SUSPENSION MAILED	
Dec. 26, 2001	CORRESPONDENCE RECEIVED IN LAW OFFICE	
Jun. 25, 2001	NON-FINAL ACTION MAILED	
Jun. 22, 2001	ASSIGNED TO EXAMINER	74672

**Maintenance Filings or Post Registration Information**

**Affidavit of Continued** Section 8 - Accepted  
**Use:**

**Affidavit of** Section 15 - Accepted  
**Incontestability:**

**Renewal Date:** Oct. 28, 2013**TM Staff and Location Information****TM Staff Information - None****File Location****Current Location:** GENERIC WEB UPDATE**Date in Location:** Oct. 09, 2013

---

**From:** TMOOfficialNotices@USPTO.GOV  
**Sent:** Wednesday, October 9, 2013 11:02 PM  
**To:** julie@inbeverage.com  
**Subject:** Trademark RN 2777811: Official Notice of Acceptance and Renewal under Sections 8 and 9 of the Trademark Act

---

**Serial Number:** 78047390  
**Registration Number:** 2777811  
**Registration Date:** Oct 28, 2003  
**Mark:** COWBOY LITTLE BARREL  
**Owner:** Allied Lomar, Inc.

Oct 9, 2013

### **NOTICE OF ACCEPTANCE UNDER SECTION 8**

The declaration of use or excusable nonuse filed for the above-identified registration meets the requirements of Section 8 of the Trademark Act, 15 U.S.C. §1058. **The Section 8 declaration is accepted.**

### **NOTICE OF REGISTRATION RENEWAL UNDER SECTION 9**

The renewal application filed for the above-identified registration meets the requirements of Section 9 of the Trademark Act, 15 U.S.C. §1059. **The registration is renewed.**

**The registration will remain in force for the class(es) listed below for the remainder of the ten-year period, calculated from the registration date, unless canceled by an order of the Commissioner for Trademarks or a Federal Court.**

**Class(es):**  
033

TRADEMARK SPECIALIST  
POST-REGISTRATION DIVISION  
571-272-9500

---

### **REQUIREMENTS FOR MAINTAINING REGISTRATION IN SUCCESSIVE TEN-YEAR PERIODS**

**WARNING:** Your registration will be canceled if you do not file the documents below during the specified time periods.

**What and When to File:** You must file a declaration of use (or excusable nonuse) **and** an application for renewal between every 9th and 10th-year period, calculated from the registration date. See 15 U.S.C. §§1058, 1059.

#### **Grace Period Filings**

The above documents will be considered as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**\*\*\*The USPTO WILL NOT SEND ANY FURTHER NOTICE OR REMINDER OF THESE REQUIREMENTS. THE**

**REGISTRANT SHOULD CONTACT THE USPTO ONE YEAR BEFORE THE EXPIRATION OF THE TIME PERIODS SHOWN ABOVE TO DETERMINE APPROPRIATE REQUIREMENTS AND FEES.\*\*\***

To view this notice and other documents for this application on-line, go to <http://tdr.uspto.gov/search.action?sn=78047390>.

NOTE: This notice will only be available on-line the next business day after receipt of this e-mail.

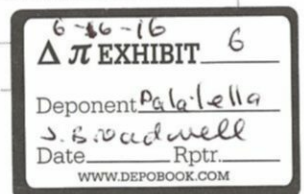
## **EXHIBIT 5**



DPO Form 1001 (Rev. 5/2015)  
DAVIS-1001-07514715 (E-File 10/11/2015)**Combined Declaration of Use and Incontestability under Sections 8 & 15**

The table below presents the data as entered.

Input Field	Entered
REGISTRATION NUMBER	2777811
REGISTRATION DATE	10/28/2003
SERIAL NUMBER	78047390
MARK SECTION	
MARK	COWBOY LITTLE BARREL
OWNER SECTION (current)	
NAME	Allied Lomar, Inc.
STREET	330 Primrose Road, Suite 512
CITY	Burlingame
STATE	California
ZIP/POSTAL CODE	94010
COUNTRY	United States
OWNER SECTION (proposed)	
NAME	Allied Lomar, Inc.
STREET	1199 Howard Avenue, Suite 350
CITY	Burlingame
STATE	California
ZIP/POSTAL CODE	94010
COUNTRY	United States
ATTORNEY SECTION (current)	
NAME	MARTIN F MAJESTIC
FIRM NAME	HANSON BRIDGETT MARCUS VLAHOS & RUDY, LL
STREET	425 MARKET STREET, 26TH FLOOR
CITY	SAN FRANCISCO
STATE	California
POSTAL CODE	94105
COUNTRY	United States
PHONE	(415) 995-5891
FAX	(415) 541-9366
EMAIL	ipfilings@hansonbridgett.com
ATTORNEY SECTION (proposed)	



NAME	Barbara L. Friedman
FIRM NAME	Hanson Bridgett LLP
STREET	425 MARKET STREET, 26TH FLOOR
CITY	SAN FRANCISCO
STATE	California
POSTAL CODE	94105
COUNTRY	United States
PHONE	(415) 995-5891
FAX	(415) 541-9366
EMAIL	ipfilings@hansonbridgett.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
ATTORNEY DOCKET NUMBER	27251.1
OTHER APPOINTED ATTORNEY	Susan G. O'Neill, Garner K. Weng, Arman Javid
<b>GOODS AND/OR SERVICES SECTION</b>	
INTERNATIONAL CLASS	033
GOODS OR SERVICES	KEEP ALL LISTED
SPECIMEN FILE NAME(S)	\\TICRS\EXPORT8\IMAGEOUT8\780\473\78047390\xml\1\81_50002..JPG
SPECIMEN DESCRIPTION	product label
<b>PAYMENT SECTION</b>	
NUMBER OF CLASSES	1
NUMBER OF CLASSES PAID	1
SUBTOTAL AMOUNT	300
TOTAL FEE PAID	300
<b>SIGNATURE SECTION</b>	
SIGNATURE	/mp/
SIGNATORY'S NAME	Marci Palatella
SIGNATORY'S POSITION	President
DATE SIGNED	10/26/2009
PAYMENT METHOD	DA
<b>FILING INFORMATION</b>	
SUBMIT DATE	Mon Oct 26 12:49:59 EDT 2009
TEAS STAMP	USPTO/S08N15-XX.XXX.XXX.X XX-20091026124959177290-2 777811-4601eb54e51e6a2bcf 494860cc7327941a-DA-8427- 20091023195502112335



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**Combined Declaration of Use and Incontestability under Sections 8 & 15**

**To the Commissioner for Trademarks:**

**REGISTRATION NUMBER:** 2777811

**REGISTRATION DATE:** 10/28/2003

**MARK:** COWBOY LITTLE BARREL

The owner, Allied Lomar, Inc., having an address of  
1199 Howard Avenue, Suite 350  
Burlingame, California 94010  
United States

is filing a Combined Declaration of Use and Incontestability under Sections 8 & 15.

For International Class 033, the mark is in use in commerce on or in connection with **all** of the goods or services listed in the existing registration for this specific class; **and** the mark has been continuously used in commerce for five (5) consecutive years after the date of registration, or the date of publication under Section 12(c), and is still in use in commerce on or in connection with **all** goods or services listed in the existing registration for this class. Also, no final decision adverse to the owner's claim of ownership of such mark for those goods or services exists, or to the owner's right to register the same or to keep the same on the register; and, no proceeding involving said rights pending and not disposed of in either the U.S. Patent and Trademark Office or the courts exists.

The owner is submitting one specimen for this class showing the mark as used in commerce on or in connection with any item in this class, consisting of a(n) product label.

[Specimen File1](#)

The registrant hereby appoints Barbara L. Friedman and Susan G. O'Neill, Garner K. Weng, Arman Javid of Hanson Bridgett LLP  
425 MARKET STREET, 26TH FLOOR  
SAN FRANCISCO, California 94105  
United States

to file this Combined Declaration of Use and Incontestability under Sections 8 & 15 on behalf of the registrant. The attorney docket/reference number is 27251.1.

A fee payment in the amount of \$300 will be submitted with the form, representing payment for 1 class(es), plus any additional grace period fee, if necessary.

**Declaration**

*The mark is in use in commerce on or in connection with the goods and/or services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce. The mark has been in continuous use in commerce for five (5) consecutive years after the date of registration, or the date of publication under Section 12(c), and is still in use in commerce. There has been no final decision adverse to the owner's claim of ownership of such mark, or to the owner's right to register the same or to keep the same on the register; and there is no proceeding involving said rights pending and not disposed of either in the U.S. Patent and Trademark Office or in the courts.*

The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of this document, declares that he/she is properly authorized to execute this document on behalf of the Owner; and all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

Signature: /mp/ Date: 10/26/2009  
Signatory's Name: Marci Palatella  
Signatory's Position: President

Mailing Address (**current**):  
HANSON BRIDGETT MARCUS VLAHOS & RUDY, LL

425 MARKET STREET, 26TH FLOOR  
SAN FRANCISCO, California 94105

Mailing Address **(proposed):**

Hanson Bridgett LLP  
425 MARKET STREET, 26TH FLOOR  
SAN FRANCISCO, California 94105

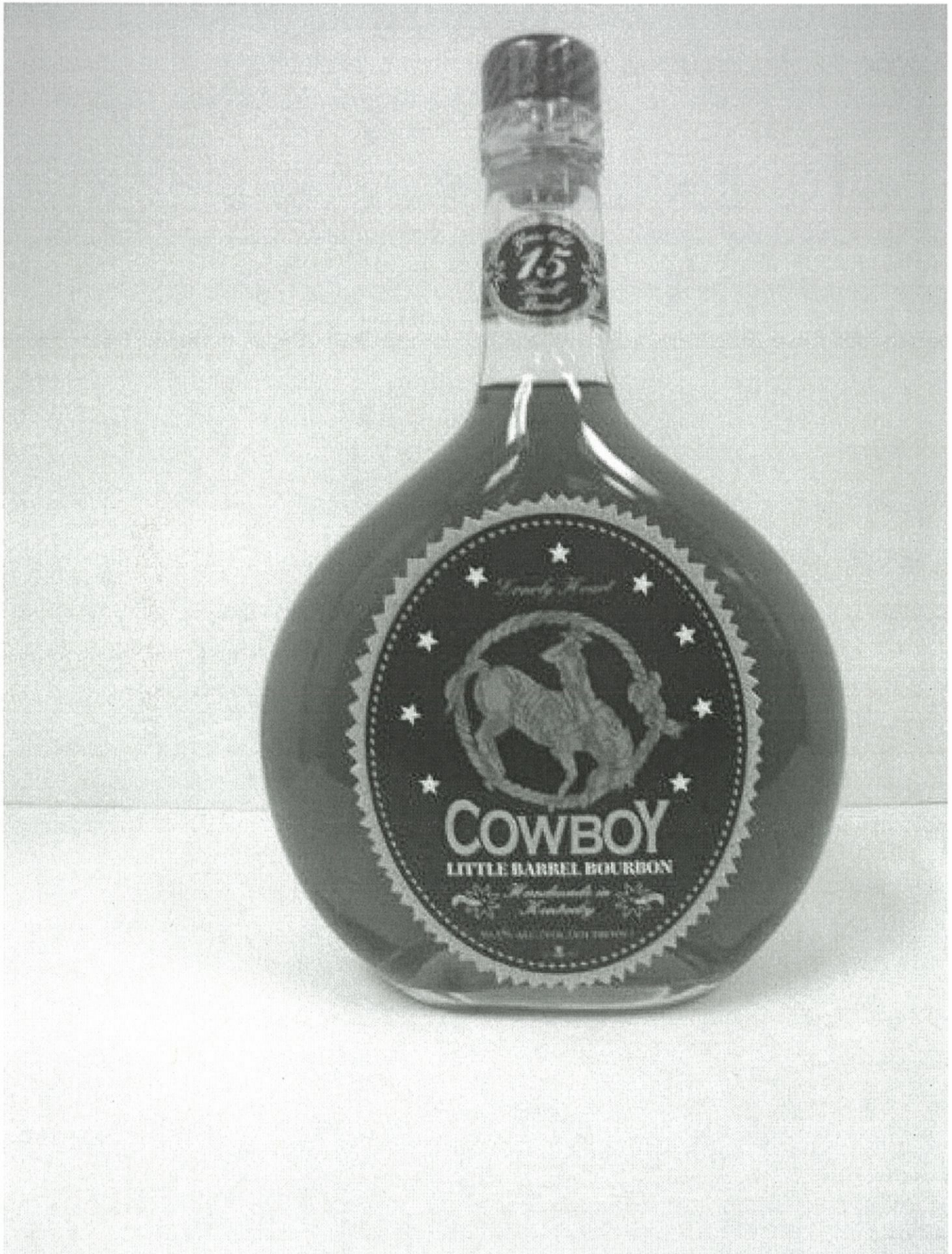
Serial Number: 78047390

Internet Transmission Date: Mon Oct 26 12:49:59 EDT 2009

TEAS Stamp: USPTO/S08N15-XX.XXX.XXX.XXX-200910261249

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## **EXHIBIT 6**



PTO Form 1363 (Rev. 6/2006)  
OMB No. 0551-0045 (Exp. 07/21/2016)**Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of  
Registration of a Mark under Sections 8 & 9**

The table below presents the data as entered.

Input Field	Entered
REGISTRATION NUMBER	2777811
REGISTRATION DATE	10/28/2003
SERIAL NUMBER	78047390
MARK SECTION	
MARK	COWBOY LITTLE BARREL
CORRESPONDENCE SECTION (current)	
NAME	Barbara L. Friedman
FIRM NAME	Allied Lomar, Inc.
INTERNAL ADDRESS	Suite 350
STREET	1199 Howard Avenue
CITY	Burlingame
STATE	California
POSTAL CODE	94010
COUNTRY	United States
PHONE	(65) 696-1700
FAX	(650) 342-9003
EMAIL	julie@inbeverage.com;marci@inbeverage.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
DOCKET/REFERENCE NUMBER	27251.1
CORRESPONDENCE SECTION (proposed)	
NAME	Allied Lomar, Inc.
STREET	401 California Drive
CITY	Burlingame
STATE	California
POSTAL CODE	94010
COUNTRY	United States
PHONE	650-696-1700
FAX	650-342-9003
EMAIL	julie@inbeverage.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes

**Δ π EXHIBIT** 7

Deponent \_\_\_\_\_

Date \_\_\_\_\_ Rptr. \_\_\_\_\_

WWW.DEPOBOOK.COM

<b>GOODS AND/OR SERVICES SECTION</b>	
INTERNATIONAL CLASS	033
GOODS OR SERVICES	Bourbon Whiskey
SPECIMEN FILE NAME(S)	\\TICRS\EXPORT\16\IMAGEOUT 16\780\473\78047390\xml3\S890002.JPG
SPECIMEN DESCRIPTION	Digital photograph showing mark applied to labels.
<b>OWNER SECTION (current)</b>	
NAME	Allied Lomar, Inc.
STREET	Suite 350
CITY	Burlingame
STATE	California
ZIP/POSTAL CODE	94010
COUNTRY	United States
<b>OWNER SECTION (proposed)</b>	
NAME	Allied Lomar, Inc.
STREET	401 California Drive
CITY	Burlingame
STATE	California
ZIP/POSTAL CODE	94010
COUNTRY	United States
PHONE	650-696-1700
FAX	650-342-9003
EMAIL	julie@inbeverage.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
<b>LEGAL ENTITY SECTION (current)</b>	
TYPE	corporation
STATE/COUNTRY OF INCORPORATION	California
<b>PAYMENT SECTION</b>	
NUMBER OF CLASSES	1
NUMBER OF CLASSES PAID	1
SUBTOTAL AMOUNT	500
TOTAL FEE PAID	500
<b>SIGNATURE SECTION</b>	
SIGNATURE	/mp/
SIGNATORY'S NAME	Marci Palatella
SIGNATORY'S POSITION	President
DATE SIGNED	10/07/2013
SIGNATORY'S PHONE NUMBER	650-696-1700

<b>PAYMENT METHOD</b>	CC
<b>FILING INFORMATION</b>	
<b>SUBMIT DATE</b>	Mon Oct 07 19:01:41 EDT 2013
<b>TEAS STAMP</b>	USPTO/S08N09-XXX.XXX.XX.X XX-20131007190141363891-2 777811-5004686fbb94b97b88 f0b06ac378e5bb76e19762473 b423055f87723597b2e7d81-C C-5579-201310071842184695 43

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PTO Form 1615 (Rev. 5/2005)  
USPS No. 055-100-90 (E-p 02/21/2015)

**Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9**

**To the Commissioner for Trademarks:**

**REGISTRATION NUMBER:** 2777811

**REGISTRATION DATE:** 10/28/2003

**MARK:** COWBOY LITTLE BARREL

The owner, Allied Lomar, Inc., a corporation of California, having an address of  
401 California Drive  
Burlingame, California 94010  
United States

is filing a Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9.

For International Class 033, the mark is in use in commerce on or in connection with **all** goods/services, or to indicate membership in the collective membership organization, listed in the existing registration for this specific class: Bourbon Whiskey ; or, the owner is making the listed excusable nonuse claim.

The owner is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in this class, consisting of a(n) Digital photograph showing mark applied to labels..

**Specimen File1**

The registrant's current Correspondence Information: Barbara L. Friedman of Allied Lomar, Inc.

Suite 350  
1199 Howard Avenue  
Burlingame, California (CA) 94010  
United States

The docket/reference number is 27251.1.

The registrant's proposed Correspondence Information: Allied Lomar, Inc.

401 California Drive  
Burlingame, California (CA) 94010  
United States

The phone number is 650-696-1700.

The fax number is 650-342-9003.

The email address is julie@inbeverage.com.

A fee payment in the amount of \$500 will be submitted with the form, representing payment for 1 class(es), plus any additional grace period fee, if necessary.

**Declaration**

**Section 8: Declaration of Use and/or Excusable Nonuse in Commerce**

*Unless the owner has specifically claimed excusable nonuse, the mark is in use in commerce on or in connection with the goods and/or services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce..*

The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of this document, declares that he/she is properly authorized to execute this document on behalf of the Owner; and all statements made of his/her own knowledge are true and that all statements



made on information and belief are believed to be true.

**Section 9: Application for Renewal**

*The registrant requests that the registration be renewed for the goods/services/collective organization identified above.*

Signature: /mp/ Date: 10/07/2013

Signatory's Name: Marci Palatella

Signatory's Position: President

Signatory's Phone Number: 650-696-1700

Serial Number: 78047390

Internet Transmission Date: Mon Oct 07 19:01:41 EDT 2013

TEAS Stamp: USPTO/S08N09-XXX.XXX.XX.XXX-201310071901

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